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IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (Dec. 10, 1948) 9, 10, 14
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OTHER AUTHORITIES:

Brownlie, Ian, *Principles of Public International Law* (5th ed. 1998) 9

Clapham, Andrew, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," *in* Liability of Multinational Corporations Under International Criminal Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) 11
Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 16 I.L.M. 1450 (opened for signature Dec. 17, 1976, insufficient signatures for entry into force), *information available at* http://sedac.ciesin.org/entri/register/reg-092.rrr.html 8
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International Labour Organization, website, http://www.ilo.org 8
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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Manufacturers (the "NAM") is the nation's largest broad-based industrial trade association. The NAM represents 14,000 member companies (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Many of its members have operations in foreign countries.

Over the past decade, corporations have been sued under 28 U.S.C. § 1350, the provision generally known as the Alien Tort Statute ("ATS"), by plaintiffs alleging that the companies have violated either alleged norms of customary international law not assented to by the United States or treaties ratified by the U.S. but declared to be "non-self-executing."[2] As evidence of the purported norms of customary international law on which they rest their cases, plaintiffs often cite treaties, conventions, and covenants that have not been universally ratified, that are non-self-executing, or that contain only broad and indefinite aspirational goals.[3] They also rely on non-binding UN General Assembly declarations, other multinational declarations of principle, and affidavits by scholars that consist of speculations about what the law ought to be rather than accurate descriptions of the actual practices and

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its members made any monetary contribution to its preparation or submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

[2] While 28 U.S.C. § 1350 is also commonly referred to as the Alien Tort Claims Act or "ATCA," as it is in the Ninth Circuit decision below, this name misleadingly analogizes Section 1350 to the Federal Tort Claims Act, which expressly authorizes private suits for damages against the United States. The term "Alien Tort Statute" is also imperfect, because it suggests that the provision was originally enacted as a stand-alone statute, rather than as a clause of Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 76.

[3] The Brief for the National Foreign Trade Council *et al.* as *amici curiae* describes (at 6–8) some of the representative cases.

legal obligations of States. See, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003). Often, a corporate defendant is not alleged to have directly injured the plaintiffs but instead to have aided and abetted or otherwise facilitated unlawful acts by army personnel or other foreign government officials.

A number of these cases remain pending, the courts having denied motions to dismiss for failure to state a claim. Even if these cases are ultimately dismissed on motions for summary judgment or the defendants are found not liable after trial, defendants in the meantime will have suffered great expense and disruption to their businesses. As amplified in the Brief of the National Foreign Trade Council *et al.* as *amici curiae* in support of petitioner, these suits are imposing significant economic costs on the US economy.

This case does not involve any multinational corporations. *Amicus* has no direct interest in the legality of an alleged arbitrary detention by an agent of the United States in Mexico, nor does *amicus* express a view on the legality of such detentions. Nevertheless, *amicus* has a strong interest in the correct interpretation of the ATS and in standards for determining whether particular conduct violates customary international law for purposes of suits under that statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Briefs for Petitioner, the United States, and the National Foreign Trade Council *et al.* as *amici curiae* in support of Petitioner all present persuasive reasons why the ATS does not create a private right of action for damages for violations of international law. We agree that the ATS is what it appears to be on its face—a *jurisdictional* statute—and do not repeat those arguments.[4]

[4] The ATS, 28 U.S.C. § 1350, provides in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Whether this court holds that the ATS provides a cause of action or is, instead, only jurisdictional, the text of the statute makes clear that courts in ATS cases must determine, as a threshold matter, if the complaint alleges a violation of "the law of nations." As many courts have noted, this can be a difficult task. *E.g.*, *Flores*, 343 F.3d at 154.

In Part I of the argument, *amicus* urges that no norm of customary international law should be enforceable in United States courts unless the norm (a) is "universal," which it cannot be unless the United States has assented to it; (b) is clearly obligatory with respect to the defendant, which it cannot be if it is merely aspirational or not intended to govern the conduct of the defendant; and (c) provides reasonably clear and specific standards of conduct.

In Part II, *amicus* provides concrete examples of the ways in which the erroneous assumption that the ATS provides a private cause of action has led to incorrect rulings harmful to multinational corporations on many substantive issues that routinely arise in ATS cases, including choice of law, statute of limitations, exhaustion of local remedies, retroactivity, and standing. A ruling that the ATS creates no cause of action would prevent those important issues from being decided on the erroneous assumption that Congress addressed them in the ATS.

ARGUMENT

I. A Norm of Customary International Law Must Have the Assent of the United States, Be Obligatory, and Be Specific To Be Enforceable in United States Courts.

This case affords the Court an opportunity to give much needed guidance to the lower courts on how to determine actionable rules of international law.[5] In its decision below, the Ninth Circuit stated that it was careful "to limit actionable

[5] Virtually all of the lower courts now use the term "customary international law" instead of the term "law of nations," the language of the ATS. Conventionally, "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

violations to those international norms that are 'specific, universal, and obligatory.'" *Alvarez-Machain* v. *United States*, 331 F.3d 604, 612 (9th Cir. 2003) (*en banc*), Pet. 1a, 10a (citation omitted). "This formulation," the court added, "is in keeping with the narrow scope of ATCA jurisdiction and the general practice of limiting judicial review to those areas of international law that have achieved sufficient consensus to merit application by a domestic tribunal." *Id.* The recent decision of the Second Circuit in *Flores*, while using slightly different words, applies the same factors as the Ninth Circuit in demonstrating the same intent to limit court enforcement of purported violations of customary international law. As explained by the Second Circuit, "those *clear and unambiguous* rules by which States *universally abide*, or to which they accede, *out of a sense of legal obligation* and mutual concern, constitute the body of customary international law." 343 F.3d at 158 (emphasis added).

In what follows, *amicus* shows why the three factors identified by the Second and Ninth Circuit are important and how they should be interpreted. We also show that the Ninth Circuit erred in applying the factors. Notably, the Ninth Circuit declined to rule that a norm of customary international law must have the assent of the United States to be "universal"—a failure that sent the Ninth Circuit off on an examination of treaties not ratified by the United States. Furthermore, the Ninth Circuit failed to address correctly whether the norm was obligatory by relying inappropriately on aspirational norms, UN declarations, and a non-self-executing treaty ratified by the United States.

Requiring the assent of the United States will satisfy the universality requirement and, at the same time, is likely to result in a statute or self-executing treaty that satisfies the requirement that a norm be obligatory by making clear who is bound by it. Moreover, if the United States expresses its assent by incorporating the norm of international law into a statue or self-executing treaty, the specificity requirement is

much more likely to be satisfied, and potential defendants in ATS cases are much more likely to have fair notice of precisely what conduct is and is not permissible.[6]

A. A Norm of Customary International Law Must Have the Assent of the United States To Be Enforceable in United States Courts.

Amicus agrees with the principal dissent below that, in determining whether the conduct alleged in a complaint violates customary international law, a court should begin by asking whether the United States has assented to the alleged norm and should end its inquiry if the United States has not assented.[7] That is, a purported norm of international law cannot be deemed "universal" by United States courts if the United States has not assented to it.[8]

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[6] Other briefs in this case argue that the term "law of nations" as used in the ATS should be limited to the accepted meaning of that term in 1789, following the lead of Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798 at 813–16 (D.C. Cir. 1984). *Amicus* supports those arguments, but focuses here on the correct application of the three factors addressed above.

[7] As we have seen, both the Ninth and Second Circuits have ruled that a norm of customary international law must "be universal," a ruling that would appear on its face to make the inquiry substantially easier. The Ninth Circuit, however, took issue with the rule urged by the principal dissent that, in order for a norm to be deemed universal, it was essential to show that the United States assented to the norm. 331 F.3d at 620, Pet. 25a, n.15. The principal dissent urged that courts in ATS cases should take as their starting point of analysis the rule that "[a] norm to which the political branches of our government have refused to assent is not a universal norm." 331 F.3d at 650, Pet. 81a (O'Scannlain, J., dissenting).

[8] This requirement does not mean that the United States cannot violate a norm of customary international law. If the United States has assented to a norm of customary international law, then a United States court could find, in an appropriate case, that an agency, official, or employee of the United States has violated that norm. See *Flores*, 343 F.3d at 154 ("Of course, States need not be universally successful in implementing the principle in order for a rule of customary international law to arise. If that were the case, there would be no need for customary international law."). The often-cited case of *The Paquete Habana*, 175 U.S. 677 (1900), is an

Two sound reasons support this approach. The first is the one articulated by the Second Circuit in *United States* v. *Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, 124 S. Ct. 353, 492 (2003): if a rule has not gained the assent of a country with the geopolitical significance of the United States, it can hardly be said to be universal. The second reason strikes closer to home. United States courts should not encroach upon the powers of the political branches by enforcing rules to which the United States has not assented. As the Brief for the United States explains, for a court to enforce a rule not reflected in a congressional statute, a treaty ratified by the United States, or United States practice raises grave separation of powers concerns. The Constitution grants Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Art. I, § 8, cl. 10. As Judge Randolph recently stated, in the light of the history of the Define and Punish Clause, it is "abundantly clear that Congress—not the Judiciary—is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *Al Odah* v. *United States*, 321 F.3d 1134, 1147 (D.C. Cir.) (concurring opinion), *cert. granted*, 124 U.S. 534 (2003) (Nos. 03-334 & 03-343). Moreover, in one of the few cases in this Court in which jurisdiction was claimed under the ATS, *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908), the Court (per Holmes, J.) found it "plain" that it is "impossible" for the courts to declare an allegedly unlawful act of a government official to be a tort in violation of the law of nations, within the meaning of the ATS, "when the Executive, Congress and the treaty-making power all have adopted the [official's allegedly unlawful]

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example of this principle. See *id.* at 712 (stating: "The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels," although ruling that the capture at issue, of such a vessel by a United States gunboat, violated the rule.).

act." *Id.* at 52. This ruling points squarely towards requiring United States assent.

In determining this threshold question of United States assent, courts should not consider international instruments that the United States has not approved. As the Second Circuit stated in *Flores*,

> "The evidentiary weight to be afforded to a given treaty varies greatly depending on (i) how many, *and which*, States have ratified the treaty, and (ii) the degree to which those States actually implement and abide by the principles set forth in the treaty." 343 F.3d at 163 (emphasis added).

See also *United States v. Yousef,* 327 F.3d at 92 n.25.

Thus, the Ninth Circuit erred in the course of ruling that arbitrary detention violated international law when it looked not just to the International Covenant on Civil and Political Rights ("ICCPR"),[9] which the United States has ratified, but also to three regional conventions that the United States has not ratified.[10] The same error has been committed in other cases, including, for example, *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003) (denying motion to dismiss) (in holding that a corporation could be liable, relying on five conventions, none of

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[9] S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (opened for signature Dec. 16, 1966, entered into force Mar. 23, 1976, entered into force for the U.S. Sept. 8, 1992) (ratified by the U.S. with five reservations, five understandings, four declarations, and one proviso, 138 Cong. Rec. 8070–71 (1992)).

[10] The American Convention on Human Rights, 1144 U.N.T.S. 143 (opened for signature Nov. 22, 1969, entered into force July 18, 1978); the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 (opened for signature Nov. 4, 1950, entered into force September 3, 1953); and the African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (opened for signature June 27, 1981, entered into force Oct. 21, 1986). 331 F.3d at 621, Pet. 26a, n.17.

which was ratified by the United States,[11] and one convention that never went into effect for any country[12]).

Determining United States assent as a threshold matter is not only faithful to the notion of universality that underlies customary international law and our own constitutional separation of powers concerns, but also has the practical virtue (as the principal dissent below recognized) of obviating the need in many instances for United States courts to engage in substantially more difficult inquires, including whether the norm is obligatory rather than merely aspirational, even though the United States has not made it so, and whether it is sufficiently

[11] In order of citation in the opinion: Convention Concerning the Application of the Principles of the Right to Organise and To Bargain Collectively (ILO No. C98) (opened for signature July 1, 1949, entered into force July 18, 1951); Convention on Third Party Liability in the Field of Nuclear Energy (Org. for Econ. Co-operation. & Dev.), as amended, 956 U.N.T.S. 251 (opened for signature July 29, 1960, entered into force Apr. 1, 1968); International Convention on Civil Liability for Oil Pollution Damage (Inter-Governmental Maritime Consultative Org.), 973 U.N.T.S. 3 (opened for signature Nov. 29, 1969, entered into force June 19, 1975) (erroneously cited by the court to 26 U.S.T. 765, the citation for a different treaty ratified by the U.S.); Vienna Convention on Civil Liability for Nuclear Damage (Int'l Atomic Energy Agency), 1063 U.N.T.S. 265 (opened for signature May 21, 1963, entered into force Nov. 12, 1977); Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (Inter-Governmental Maritime Consultative Org.), 974 U.N.T.S. 255 (opened for signature Dec. 17, 1971, entered into force July 15, 1975). The dangers that lurk if courts do not focus on assent by the United States are especially dramatic in the area of labor standards, where the International Labour Organization has adopted 185 conventions over the years, many of which could be invoked by plaintiffs as norms of customary international law against corporate defendants. Yet the United States has ratified only 14 of those conventions. Current information about International Labour Organization conventions and the status of ratifications is available on its website, http://www.ilo.org.

[12] Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 16 I.L.M. 1450 (opened for signature Dec. 17, 1976, insufficient signatures for entry into force). See http://sedac.ciesin.org/entri/register/reg-092.rrr.-html.

specific, even though the United States has not addressed the matter.[13] We turn now to these two issues.

B. A Norm of Customary International Law Must Be Obligatory To Be Enforceable in United States Courts.

As the Ninth and Second Circuits recognize, for an alleged norm of international law to be enforceable in United States courts, the international instruments or practices upon which the courts rely must show that the norm is obligatory, as opposed to merely aspirational.

For example, the Universal Declaration of Human Rights[14] was intended by its drafters to be aspirational, not to set out legal norms binding on any State or individual. The Universal Declaration itself states that it was proclaimed

> "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both

[13] In this discussion, we have not specifically addressed "*jus cogens*" norms. See 331 F.3d at 612–14, Pet. 11a–13a. As the Ninth Circuit noted, "'[M]ore authority exists for the category of *jus cogens* than exists for its particular content.'" 331 F.3d at 614, Pet. 13a (quoting Ian Brownlie, *Principles of Public International Law* 516–17 (5th ed. 1998)). Moreover, this case does not appear to concern any norms that are candidates for *jus cogens* status. See Restatement (Third) of the Foreign Relations Law of the United States § 102, Reporters' Note 6 (1987). Accordingly, we do not discuss the concept further, except to point out that it is particularly difficult to imagine a norm of international law achieving the status of a *jus cogens* norm without the assent of the United States (or other countries of similar stature) or to justify a United States court finding or applying such a norm in the face of dissent by the political branches.

[14] G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 1, at 71, U.N. Doc. A/810 (Dec. 10, 1948).

among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

This is not the language of law-making.[15]

Thus, the Ninth Circuit erred in finding that the Universal Declaration, "although not binding on states, constitutes 'a powerful and authoritative statement of the customary international law of human rights,'" 331 F.3d at 618, Pet. 22a, n.12 (quoting *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992)), and that the Declaration is "perhaps the most well-recognized explication of international human rights norms." 331 F.3d at 620–21, Pet. 25a.

Much the same is true generally of UN General Assembly Declarations, contrary to the Ninth Circuit's suggestion. 331 F.3d at 617, Pet. 20a ("Evidence of the law of nations may also be garnered from * * * United Nations declarations."). The General Assembly is not a law-making body. While principles it announces in declarations may become norms of customary international law, their presence in a declaration neither makes them so nor is evidence that they have yet achieved the status of international law. *Flores*, 343 F.3d at 165–68.

It must also be clear that the norm applies to private individuals. Even bodies that can make international law—such as groups of nations ratifying multinational conventions—

[15] Moreover, as the Universal Declaration neared its final vote in the UN General Assembly, Eleanor Roosevelt, Chairman of the Commission on Human Rights and a member of the U.S. delegation, stated:

> "In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations." As quoted in 1 Marjorie M. Whiteman, Digest of International Law 53 (1963).

choose in many instances to impose obligations only on States or State actors and not on private individuals.[16]

And even when multinational human rights conventions do not specify the parties to which obligations apply, it may be clear in context that it is official, not private action, that is being addressed. For example, while Article 6 of the ICCPR states: "Every human being has the inherent right to life," and "No one shall be arbitrarily deprived of his life," it would clearly be taking those provisions entirely out of context to read them as making acts by private citizens a violation of the Covenant.[17]

In this connection, we note that the Ninth Circuit did not address the "declaration" accompanying U.S. ratification of

[16] See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 (opened for signature Dec. 10, 1984, entered into force June 26, 1987, entered into force for the U.S. Nov. 20, 1994) (ratified by the U.S. with two reservations, five understandings, two declarations, and one proviso, 136 Cong. Rec. 36192–99 (1990)) ("torture" not defined to reach purely private conduct).

[17] This case does not present the question whether the norms of international law at issue here are enforceable against corporations as opposed to natural persons. There is considerable support for the view that customary international law does not routinely impose obligations on corporations. For example, the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998, entered into force July 1, 2002, not ratified by the U.S.), available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm, restricts its scope to "natural persons." Art. 25. There was lengthy debate among the nations participating in the Rome Conference concerning the inclusion of corporations within the jurisdiction of the International Criminal Court. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/2/Add. 1 (1998); United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf. 183/13 (Vol. II) (1998); Andrew Clapham, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," *in* Liability of Multinational Corporations Under International Criminal Law 139 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

the ICCPR that the Convention is not "self-executing." 132 Cong. Rec. 8071. *Amicus* supports the position of the United States on this issue: a non-self-executing declaration means that courts cannot enforce a treaty provision absent specific congressional action incorporating the norm, because such a declaration represents a decision by the United States treaty-makers that the treaty provisions should not impose obligations enforceable in private court actions. See, *e.g.*, *Flores*, 343 F.3d at 164 n.35 (finding that the ICCPR, as a non-self-executing treaty, "*does not create a private cause of action in United States courts*"). Such a convention may bind the United States, but it does not make private individuals subject to such obligations.

Similarly, in determining whether particular conduct violates a rule of international law, it is irrelevant that such conduct may be widely prohibited by national law. The Ninth Circuit erroneously found it relevant to the issue whether arbitrary arrest violates international law that such a prohibition "is reflected in at least 119 national constitutions." 331 F.3d at 620, Pet. 25a. But as the Second Circuit has recently found:

> "Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law. As we explained in *Filartiga* [v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),] and in *ITT* v. *Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975):
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> > [T]he mere fact that every nation's municipal [*i.e.*, domestic] law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . [into] the law of nations." It is only where the nations of the world have demonstrated that *the wrong is of mutual, and not merely several, concern, by means of express international accords*, that a wrong generally recognized becomes an international law violation within the meaning of the statute.

> "* * * Therefore, for example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the ATCA as a violation of customary international law because the 'nations of the world' have not demonstrated that this wrong is 'of mutual, and not merely several, concern.'" *Flores*, 343 F.3d at 155 (internal citations omitted).[18]

In sum, not every principle found in sources of international law is intended to be obligatory, as opposed to aspirational, or has matured to the point of being obligatory. And even if obligatory for States, a particular norm may not impose obligations upon private individuals.

C. A Norm of Customary International Law Must Be Specific To Be Enforceable in United States Courts.

As the Fifth and Second Circuits have rightly observed, customary international law cannot be established by statements of "abstract rights and liberties devoid of articulable or discernable standards and regulations." *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999); *Flores*, 343 F.3d at 161 (same). Many principles in international in-

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[18] Similarly, it is immaterial that a norm is an accepted part of U.S. law. The Second Circuit, in a case preceding *Flores*, ruled that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Kadic* v. *Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995). While it may be understandable that courts turn for guidance to a large body of domestic law with which they are familiar, the relevant question for purpose of ATS jurisdiction based on violations of customary international law is the extent to which the "color-of-law" jurisprudence of Rev. Stat. § 1979, 42 U.S.C. § 1983 has become universally accepted as obligatory in the international community. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443, 450 (2001) ("American principles of state action, which were developed in U.S. civil rights law and have proved critical in corporate ATCA cases, cannot simply be transferred to the international arena.").

struments are deliberately vague to ensure the widest possible acceptance in the international community. See *Flores*, 343 F.3d at 161 (referring to certain norms in the Universal Declaration of Human Rights, in the International Covenant on Economic, Social and Cultural Rights,[19] and in the Rio Declaration on Environment and Development[20] as "boundless and indeterminate" and as "express[ing] virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them"). Such principles, however, should not be deemed to have achieved the status of customary international law.

It is not surprising that the Universal Declaration of Human Rights—an expressly aspirational document, as we have seen—should contain unspecific statements of principle.[21] But the multinational conventions designed to codify those aspirations are often equally vague. For example, Article 6 of the ICCPR states: "Every human being has the inherent right to life. * * * No one shall be arbitrarily deprived of his life." And Article 12 of the International Covenant on Economic, Social and Cultural Rights requires that the States "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Considering these and other statements of purported international law, the Second Circuit correctly determined that "'the rights to life and health are insufficiently definite to constitute rules of customary international law." *Flores*, 343 F.3d at 160–61.

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[19] 993 U.N.T.S. 3 (opened for signature Dec. 19, 1966, entered into force Jan. 3, 1976, not ratified by the U.S.).

[20] U.N. Conf. on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992), 31 I.L.M. 874.

[21] *E.g.*, Art. 3 ("Everyone has the right to life, liberty and security of person."); Art. 12 ("No one shall be subjected * * * to attacks upon his honor and reputation."); Art. 22 ("Everyone, as a member of society, has the right to social security * * *."); Art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family * * *.").

The specificity requirement is especially important with respect to the issue of secondary liability for alleged official violations of international norms—a theory for attempting to hold multinational corporations liable in numerous ATS cases.[22] This Court has held that civil liability for aiding and abetting cannot be imposed as a matter of judicial inference of supposed congressional intent accompanying a statute that does not expressly provide such liability, for policy reasons related to the underlying statutory violation, or because aiding and liability is criminal under federal law. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). Similar principles should constrain secondary liability as a matter of customary international law. This is especially true because some international conventions specifically address secondary liability, showing that the matter deserves the specific attention of a regular law-making body. *E.g.*, Convention on the Prevention and Punishment of the Crime of Genocide,[23] Art. 3 ("The following acts shall be punishable: * * * [¶] (e) Complicity in genocide.").[24]

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[22] See, *e.g.*, *Doe I* v. *Unocal Corp.*, Nos. 00-56603 *et al.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *vacated pending rehearing en banc*, 2003 WL 359787 (9th Cir. Feb. 14, 2003); *Sarei* v. *Rio Tinto, plc*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *appeal docketed*, Nos. 02-56256 & 02-56390 (9th Cir. July 26, 2003, Aug. 15, 2003); *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002).

[23] S. Exec. Doc. O, 81st Cong., 1st Sess. (1949), 78 U.N.T.S. 277 (opened for signature Dec. 9, 1948, entered into force Jan. 12, 1951, entered into force for the U.S. Feb. 23, 1989, ratified by the U.S. with two reservations, five understandings, and one declaration, 132 Cong. Rec. 2349–50 (1986)). See also 18 U.S.C. §§ 1091–1093, enacted by the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988).

[24] See also Article 25.3(c) of the Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (adopted July 17, 1998, entered into force July 1, 2002, not ratified by the U.S.), available at http://www.un.org/law/icc/statute/99_corr/cstatute.htm (individual criminal responsibility for certain facilitating, aiding, and abetting). The Ninth Cir-

Amicus recognizes that vaguely stated norms have sometimes been found to be appropriate for court enforcement. For example, the Constitution may contain its own "magnificent generalities,"[25] such as the Due Process Clauses and the Equal Protection Clause, which courts have enforced in this country for years. But the Constitution is expressly made "the Supreme Law of the Land," as are "treaties of the United States" (although court enforcement may not be appropriate if they are not "self-executing"). Customary international law, by contrast, has no such constitutional status, and by its nature is not incorporated in a self-executing treaty ratified by the United States. Multinational conventions that the United States has declined to ratify also lack such status. In considering whether to apply norms derived from principals in international instruments or practices, requiring reasonable specificity as to private liability ensures that the international community has in fact reached a consensus on that issue.

Multinational corporations are already subject to at least two, and usually more, legal regimes—including the law of

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cuit panel in *Doe I* v. *Unocal Corp.*, *supra*, relied on decisions of special purpose tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to determine the contours of aiding and abetting liability on the part of a corporation. 2002 WL 31063976, at *12–13. The concurrence forcefully protested looking to "an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal" to find such secondary liability on the part of corporations. *Id.* at *27. The varied status of such liability in United States jurisdictions—federal and state—should make it clear that the United States has not assented to such liability for private individuals as a matter of civil liability for international law violations, even though the United States participated in the establishment of those special-purpose criminal tribunals.

[25] The phrase appears in Walter Murphy, Constitutional Interpretation as Constitutional Creation, the 1999–2000 Harry Eckstein Lecture, *available at* http://hypatia.ss.uci.edu/democ/papers/murphy.htm. See also Ronald Dworkin, Law's Empire 355 (1986) (Equal Protection and Due Process Clauses described as "notoriously abstract").

the country in which they are incorporated and the law of the country in which they operate. They are also well aware that some norms drawn from international law apply to them.[26] But subjecting them to yet another legal regime, characterized by vague norms that provide no reasonable guidance about acceptable conduct, serves only the interests of successful plaintiffs and their lawyers—not the interests of the countries in which multinational corporations operate, not the interest of world in reasonably free trade, and not the interests of the United States, which encourages free trade and investment abroad.

II. Lower Court Rulings That the ATS Creates a Private Cause of Action Have Led Those Courts To Improperly Resolve Many Substantive Issues That Arise in ATS Lawsuits.

As stated in the Introduction, other briefs in this case show that the ATS does not itself create a private cause of action for damages, as its plain language confirms. This brief does not duplicate those arguments. We give here specific examples of the ways in which the assumption that the ATS creates a private cause of action has led to improper resolution of many substantive issues in ATS cases. Those substantive issues can arise in any ATS lawsuit—even if the ATS is only jurisdictional—but they should not be decided on the erroneous assumption that Congress intended to influence their outcome by providing for a private cause of action under the ATS.

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[26] For example, the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note, passed in part to incorporate into US law the international norm prohibiting official torture, imposes liability on corporate officers and employees (as on any other individual) who engage in torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Section 2(a), 106 Stat. 73. Congress determined the extent to which those norms require specificity for court enforcement. Section 3, 106 Stat. 73.

Choosing U.S. versus foreign law. The Ninth Circuit found that the federal choice-of-law rule coincided with the Restatement (Second) of Conflict of Laws (1971). 331 F.3d at 633, Pet. 48a–49a. In applying that rule to the issue whether to apply United States or Mexican law, the Ninth Circuit did not simply analyze the four factors in Section 145 of the Restatement.[27] It said that it "must also take into account the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations." 331 F.3d at 635, Pet. 52a. It then proceeded to rule that "limitations on damages under Mexican law—including the unavailability of punitive damages—*are not consistent with the congressional policy that underlies the ATCA*." *Id.* (emphasis added). If the ATS is merely a jurisdictional statute, however, it contains no congressional policy with respect to punitive damages or, indeed, with respect to any measure of damages.

Statute of limitations. Many courts, including the Ninth Circuit, have decided that the appropriate statute of limitations in ATS cases is the 10-year statute expressly provided in the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (1992), *reprinted in* 28 U.S.C. § 1350 note. *E.g.*, *Papa* v. *United States*, 281 F.3d 1004, 1011–13 (9th Cir. 2002); *Wiwa* v. *Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *61–62 (S.D.N.Y. Feb. 22, 2002).[28] But there is no sound basis for

[27] Section 145(1) of the Restatement provides: "The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationships to the occurrence and the parties under the principles stated in § 6." Section 145(2) then lists the following "contacts" that should "be taken into account in applying the principles of § 6 to determine" the state with the "most significant relationship": "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."

[28] It appears that many courts, including the Ninth Circuit, have misinterpreted the significance of the placement of the TVPA in the U.S. Code as a note to 28 U.S.C. § 1350 (the ATS), mistakenly believing or assuming that Congress chose to place the TVPA there. See *Papa* v. *United States*, 281 F.3d at 1012 (in ruling on statute of limitations: "The provisions of the TVPA were added to the ATCA, further indicating the close relationship between the two statutes."); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001) (in ruling on statute of limitations: "Congress enacted the [TVPA] as a statutory note to the ATCA."), *aff'd sub nom. Deutsch* v. *Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003); *Aguinda* v. *Texaco, Inc.*, 142 F. Supp. 2d 434, 534 (S.D.N.Y. 2001) (in ruling on *forum non conveniens*, referring to "an amendment to the ATCA, known as the [TVPA]"), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); *Iwanowa* v. *Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999) (in ruling on the private right of action issue: "Indeed, the TVPA is codified as a statutory note to the ATCA."). But the Congress that passed the TVPA did not choose to amend the ATS. Nor did Congress place the TVPA as a note to the ATS in the U.S. Code. The Office of the Law Revision Counsel of the House of Representatives chose the location of the TVPA in the Code. That office places statutory provisions as sections or notes to the U.S. Code or in Appendices to enacted titles when Congress has not passed the statutory provision as a section of the U.S. Code or as an amendment to a previously enacted provision of the Code. H.R. Res. No. 988, 93d Cong., § 205(c), enacted, Pub. L. No. 93-554, tit. I, ch. III, 88 Stat. 1777 (1974), *as amended*, 2 U.S.C. § 285b. That office could just as easily have placed the three sections of the TVPA as three new sections of Title 42 of the Code (a title not yet enacted into law) or in the Appendix to Title 28. See, *e.g.*, 18 U.S.C. App. (containing provisions not enacted into law in Code form); 46 U.S.C. App. (same). Having chosen to place the TVPA in Title 28, an enacted title of the Code, the Office had no choice but to put it in a note to what it determined to be a related section. That choice, however, cannot be attributed to Congress.

applying a statute of limitations applicable to an expressly-created—and quite limited—cause of action more generally to all suits that find their way to federal court by way of the ATS, unless those suits state claims under the TVPA. Adoption of the unusually long 10-year statute of limitations found in the TVPA, as opposed to the generally shorter statutes of limitations set by state law in tort cases, exposes defendants to burdensome proceedings long after much evidence has disappeared. Judicial adoption of such a statute of limitations for the ATS exposes the fallacy that the ATS created a cause

of action. Decisions about the applicable statute of limitations should be based on express congressional action addressing suits outside of the context of the TVPA or on the prevailing rule in favor of analogous state statutes of limitations.

Exhaustion of local remedies. It is generally a requirement of international law that local remedies be sought or shown to be unavailable before resort is made to international law. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 422–23 (1964). Reflecting this understanding, the TVPA expressly requires such exhaustion as a condition to a successful TVPA lawsuit. TVPA, § 2(b). Nevertheless, at least one court has rejected the exhaustion-of-remedies doctrine in an ATS suit on the ground that Congress put such a requirement in the TVPA and did not do so in the ATS. *Sarei* v. *Rio Tinto plc*, 221 F. Supp. 2d 1116, 1137, 1139 (C.D. Cal. 2002), *appeal docketed*, Nos. 02-56256 & 02-56390 (9th Cir. July 26, 2003, Aug. 15, 2003).[29] That argument makes some sense on the false assumption that Congress created a cause of action for damages in the ATS. It makes no sense on the correct understanding that, in passing the ATS, Congress was only providing a jurisdictional base and not addressing the terms upon which one might recover damages.

Retroactivity of the TVPA. When respondent's case was previously before the Ninth Circuit, the court ruled that the TVPA was retroactive, relying in substantial part on its view that the TVPA "does not impose new duties or liabilities on defendants," because "aliens have had the right to adjudicate torture claims in our federal courts since the passage of the [ATS] in 1789." *Alvarez-Machain* v. *United States*, 107 F.3d 696, 702 (9th Cir. 1996). Whether or not that conclusion would be appropriate if the ATS had created a cause of action, the merits of the issue look very different on the correct view that the ATS did no such thing.

[29] The court in *Sarei* stated: "Congress could, had it wished to do so, have amended the ATCA to impose such a requirement at the time it enacted the TVPA. It did not do so." 221 F. Supp. 2d at 1137. And later, "Nonetheless, the court here must apply the plain language of the ATCA, which does not require such a measure." *Id.* at 1139.

Standing. Several courts have looked to the TVPA to determine whether plaintiff has standing to bring an ATS claim. *E.g.*, *Estate of Cabello* v. *Fernandez-Larios*, 157 F. Supp. 2d 1345, 1355 (S.D. Fla. 2001) ("When a federal statute does not specify key details, such as standing, federal courts generally borrow analogous state law, 'unless its application would defeat the purpose of the federal statute,'" and finding the TVPA to be "'the most analogous federal statute.'") (citations omitted). But the TVPA can be characterized as "the most analogous federal statute" only if both the TVPA and the ATS are cause-of-action statutes.

Color of law. The Second Circuit has ruled that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." *Kadic* v. *Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995). While it may be understandable that courts turn for guidance to a large body of domestic law with which they are familiar, the reference to "color of law" jurisprudence in this instance relies on a false analogy between one of the oldest and most important examples of an express cause-of-action statute—the venerable civil rights provision found in Rev. Stat. § 1979, 42 U.S.C. § 1983—and a jurisdictional statute such as the ATS.[30]

CONCLUSION

The judgment of the court of appeals should be reversed, and the court of appeals should be directed to reconsider the judgment in the light of this Court's decision on the proper scope of the Alien Tort Statute and the proper approach to

[30] While the TVPA uses the term "color of law" in § 2(a), a congressional decision to adopt the term for torture and extrajudicial killing does not necessarily mean that "color of law" jurisprudence—developed in the context of U.S. constitutional law—is suitable for all of the wide range of international law violations that might be the subject of an ATS suit.

deciding when alleged norms of customary international law are enforceable in United States courts.

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